IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC. and REACH ONE, TEACH ONE OF AMERICA, INC.,	)
Plaintiffs,	)
	)**C.A.N.: 3:06-cv-224-WKW**
v.	)
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)
Defendant.	)

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

COME NOW the Plaintiffs, Macon County Investments, Inc. ("MCI") and Reach One, Teach One of American ("Reach One, Teach One") and hereby submit this Reply Brief in Support of their Motion for Reconsideration. The Plaintiffs state the following:

I. THE PLAINTIFFS HAVE MET THE REQUISITE STANDARD FOR ASSERTING A PROPER MOTION FOR RECONSIDERATION

In their Motion, the Plaintiffs correctly stated "that there are three recognized instances in which a Motion to Reconsider is granted: '1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or manifest injustice.' *Groover v. Michelin N. Am.,Inc.*, 90 F.Supp.2d 1236, 1256 (M.D.Ala.2000)." The Plaintiffs' Motion respectfully requests that the Court correct clear error as it relates to the Court's holdings regarding the Plaintiffs' standing; the Plaintiffs' challenge of the Original Rules; and the Plaintiffs' suffering of an actual injury.

The Plaintiffs have not asserted new arguments in their Motion for Reconsideration, but rather the Plaintiffs have noted major errors in the Court's holdings as it related to facts and the application of those facts to the law. This is exactly the type of arguments which are proper for a Motion for Reconsideration.

II. THE PLAINTIFFS DO HAVE STANDING TO ASSERT THEIR EQUAL PROTECTION CLAIMS AGAINST THE DEFENDANT

A. THE PLAINTIFFS' APPLICATION FOR A BINGO LICENSE SUBSTANTIALLY COMPLIED WITH THE APPLICABLE RULES

The Court's holdings regarding the Plaintiffs' lack of standing based upon the alleged failure to provide a complete application for a bingo license was clearly erroneous. It is not for the Court to raise the Sheriff's objections long after the fact. The Sheriff's undisputed testimony provides that the Plaintiff's application substantially complied with his existing and applicable rules. The Sheriff never stated in his deposition testimony that he failed to act upon the Plaintiffs' application based upon some lack of documentation or requested information. To deny the Plaintiffs' standing in this action based upon an alleged deficiency that the Sheriff himself never took into account creates a) a separate and impermissible judicially imposed standard to obtain a bingo license, b) is clearly erroneous under the undisputed facts, and c) creates a manifest injustice to the Plaintiffs.

The blanket assertion by the Sheriff's Counsel that the Plaintiffs' re-typed application did not contain the information on the personal data sheet and that there was no complete listing of officers and directors is a misstatement. (The Plaintiffs provided this information in Sections 1 and 9 of their Application for a Bingo License). Counsel makes this assertion but never specifies what information is missing from the Plaintiffs' application or exactly what officers and directors were missing. Counsel also notes a failure to provide a bingo license fee. However, the Sheriff's deposition testimony wholly fails to identify any material information that was missing or incomplete in the Plaintiffs' application, and never mentions a failure to provide a bingo license fee as a reason for not acting on Plaintiff's application. The Sheriff's failure to deny or reject plaintiff's application after possessing it for so long should be construed as the application being in compliance with the rules. In fact, the Sheriff's undisputed deposition testimony provides that the Plaintiffs' application substantially complied with the rules. *See* Sheriff's Depo., p. 255-56, ln. 17-6. As such, the new arguments advanced by the Sheriff's counsel should be rejected as waived or untimely. The Sheriff offers this court no reasonable explanation for his failure to act and, indeed, still has not acted on the application. It is the court that is acting in the Sheriff's stead. Regardless of the new arguments made by the Sheriff in his Opposition to the Plaintiffs Motion to Reconsider, the simple truth is: the Plaintiffs' application substantially complied with the existing and applicable rules for the issuance of a bingo license, the Sheriff failed to act on the application and the Defendant's Motion for Summary Judgment should have been denied.

B. THE PLAINTIFFS SUFFERED AN ACTUAL AND REDRESSABLE INJURY

The Sheriff's limitation on the number of charities and the Sheriff's failure to grant a bingo license to the Plaintiffs have effectively denied the Plaintiffs, specifically Reach One, Teach One, the right to operate bingo gaming for charitable, educational or other lawful purposes as allowed by Amendment 744. At the time of the Sheriff's deposition, approximately 62 Class B licenses had been issued, with 60 of those being active. All active licensees are conducting bingo at one qualified location -- Macon

County Greyhound Park. This denial of the purposes articulated in Amendment 744 is an actual injury to the Plaintiffs.

MCI is a surety for Reach One, Teach One for the operation of bingo gaming and it has contracted with Reach One, Teach One to be the qualified location for its bingo gaming. Because of MCI's surety and contractual relationship with Reach One, Teach One, MCI is also injured by the Sheriff's failure to grant the Plaintiffs a license to operate bingo gaming in Macon County. Frank Thomas, as President and Shareholder of MCI, purchased 364 acres of property in Macon that was subsequently optioned to MCI for a $10 million purchase price. This property was identified in the Plaintiffs' Application as the designated "qualified location" for the operation of bingo gaming. MCI also negotiated for the financing of games.

Additionally, MCI is injured by the very existence of a bingo gaming monopoly in Macon County that has been purposely created by the Sheriff's and his attorney's rule making and enforcement processes. This form of gaming business protectionism is not specifically authorized in Amendment 744 and other statutory laws, and should not be sanctioned by the Court. This exclusivity is at the heart of plaintiffs' injuries. Anti-trust law generally recognizes a monopoly and the monopoly's restraint on competition as an actionable injury. *See Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 88 -89 (5th Cir. 1978). The Defendant's arbitrary and capriciously promulgated, anti-competitive bingo licensing rules have prohibited MCI (and others) from competing with Macon County Greyhound Park as a qualified location for bingo gaming in Macon County. The Sheriff has testified that under his rules, there is only one facility that can meet the requirements for a qualified location – the Macon County Greyhound Park ("also known as Victoryland"). The Sheriff's action and conduct in this regard is contrary to the letter and spirit of the rule-making authority granted to him in Amendment 744.

III. THE PLAINTIFFS CHALLENGED THE ORIGINAL RULES THROUGH THEIR CHALLENGE OF THE AMENDED RULES AS WELL AS THE METHOD AND PROCESS OF RULE-MAKING

The Plaintiffs challenged the Original Rules by their challenge of the Amended Rules. The preamble language in the Commentary to the First Amended and Restated Rules provide that the previous rules are "amended and restated in their entirety." The Commentary to the Second Amended and Restated Rules has similar language. In this case, the Original Rules were incorporated and subsumed as a body into the comprehensive Amended Rules. The First and Second Amended Rules are exactly the same as the Original Rules with the exception of those revisions that made obtaining a Class B Bingo License and becoming a qualified location impossible.

Contrary to the Court's finding on page 8 of the Memorandum Opinion, the Plaintiffs also challenged the process of the Defendant's rule-making by citing the amendments made to rules every six months. These amendments were arbitrary and capricious by the Defendant's own testimony. The Sheriff could not articulate any rational reason reasonably related to a legitimate government interest for these amendments. For instance, the Sheriff stated in his deposition that there was no real significance to the number "15" in his requirement that a minimum of 15 non-profit organizations must apply together for a Class B bingo license. *See* Sheriff's Depo, p. 149-150, ln. 20-4.

IV. THE PLAINTIFFS HAVE ASSERTED A VIABLE EQUAL PROTECTION CLAIM AGAINST THE SHERIFF

The growing trend in equal protection claims is the "class of one" claim. The class of one claim as articulated in *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000), provides that a successful equal protection claim is one where "the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The plaintiff in *Olech* requested that the defendant Village connect their property to its water supply. The Village required the Plaintiff to grant it a 33-foot easement to fulfill her request. Previously, the Village only required property owners to grant a 15-foot easement. The plaintiff filed suit against the Village alleging that the additional requirement was violative of the Equal Protection Clause of the Fourteenth Amendment. The plaintiff claimed that the requirement was not rational, was arbitrary and was the result of ill will. *Olech*, 120 S. Ct. at 1074. The Court held that the plaintiff's assertions that the Village's requirement was irrational and arbitrary were "sufficient to state a claim for relief under traditional equal protection analysis." *Olech*, 120 S. Ct. at 565. Using this framework, the Plaintiffs' have done more than the *Olech* Plaintiff. Therefore, the Plaintiffs' claim should survive summary judgment.

A. THE PLAINTIFFS HAVE ALLEGED THAT THEY ARE BEING TREATED DIFFERENTLY THAN OTHERS

As the Plaintiffs state in their Complaint and Motion for Summary Judgment, the Sheriff's actions only serve to treat MCI and Reach One, Teach One differently than the current and Class B Bingo licensed facility operating in Macon County. These allegations are more than mere conclusory statements. They are specific in the nature and content and evidence the Sheriff's disparate treatment towards Plaintiffs and in favor of the Macon County Greyhound's Park unauthorized monopoly over bingo gaming in Macon County.

MCI and Reach One, Teach One have alleged that previous applicants seeking a Class B Bingo license in Macon County were only required to have one (1) non-profit organization and that the location of the facility, including the land, building and improvements, had to be at least $5 million in value. In fact, the sole Class B Bingo licensed facility in Macon was granted a license to operate under these requirements. However, now that the Plaintiffs are seeking to secure a Class B Bingo license in Macon County, the Defendant Sheriff has a requirement that fifteen (15) non-profit organizations must submit an application and that the location of the facility, including the land, building and improvements, be at least $15 million in value. These allegations serve as the basis of the Plaintiffs' assertion that they are being treated differently from others and have no rational basis and serve no legitimate government interest.

The Plaintiffs have shown that there is a similarly situated entity that has received different treatment, namely the current and sole Class B Bingo licensed facility in Macon County. This fact is already patent in the pleadings filed to date that the Plaintiffs have not built a multi-million dollar facility before applying for the license. It is obvious that this is an absurd rule designed specifically to restrict the gaming market to a sole licensed Class B Bingo facility in Macon County--Victoryland. At this stage, the Plaintiffs need only establish the difference in treatment, which they have done. The Plaintiffs' allegations and supporting evidence (the Sheriff's undisputed deposition testimony) have clearly established a cause of action for the violation of the Equal Protection Clause.

B. THE PLAINTIFFS HAVE ESTABLISHED THAT THE DEFENDANT'S PROMULGATED RULES ARE IRRATIONAL AND ARBITRARY

The plaintiff in *Olech* merely asserted that the Defendant Village requirements were irrational and arbitrary, and thus, resulted in a violation of the Equal Protection Clause. MCI and Reach One, Teach One have made similar allegations and have established them through the undisputed deposition testimony of the Sheriff. The Plaintiffs have shown that there is no rational basis for the increase in the number of required non-profit organizations to obtain a license; there is no rational basis for limiting the number of non-profit organizations which can receive a license in Macon County to sixty (60); nor is there any rational basis for the Sheriff's delay in consideration of the Plaintiffs' application or the failure to issue a license.

The original rules, as amended and restated in their entirety, are not only irrational, but they create an impermissible legal barrier to commercially reasonable efforts to obtain a Class B Bingo license. They have the purpose and effect of creating an unauthorized form of protectionism for Victoryland. The Sheriff has limited the number of Class B Bingo licenses which can be issued in Macon County to sixty (60) non-profit organizations. At the time of the Sheriff's deposition, approximately 62 Class B licenses had been issued, with 60 of those being active. All active licenses are conducting bingo at one qualified location – Victoryland. *See* Sheriff's Depo., p. 203, ln. 6-12; p. 214-15, ln. 19-2. The Sheriff knows that these organizations are contractually bound to Victoryland for twenty (20) years. *See* Sheriff's Depo., p. 217, ln. 12-17. Therefore, it would be impossible for the Plaintiffs (and others) to obtain fifteen (15) additional licenses for fifteen (15) additional charities because of the Sheriff's limitation.

The Sheriff also states that MCI and Reach One, Teach One have not actually built a location valuing $15 million. However, it is commercially unreasonable to require an applicant to completely build a facility worth $15 million prior to the issuance of a license to operate a gaming facility. The Sheriff himself even stated that he would not build such a facility without a license. *See* Sheriff's Depo., p. 262, ln. 11-16. These rules would even be objectionable to the Sheriff if he were an applicant. The end result of these rules is not surprising since the lawyers who drafted the rules adopted by the Sheriff have a vested interest in Victoryland and maintaining protectionism through the Sheriff's rules. In this regard, these rules and the actions taken under the rules promulgated by the Defendant Sheriff are clearly irrational and are clearly arbitrary. If the Sheriff truly desires a monopoly for Victoryland, then that should be accomplished through the legislative process and not through the abuse of his rule-making authority conferred in Amendment 744. Furthermore, the Court should not sanction such protectionism by entering a clearly erroneous Order granting Summary Judgment in favor of the Defendant.

WHEREFORE PREMISES CONSIDERED, the Plaintiffs respectfully request that this Court grant their Motion to Reconsider, deny Defendants' summary judgment motion and reset this case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record via this Court's electronic filing system on this the 2nd day of January, 2008.

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